No. 22480

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID ERLICH,

Appellant,

vs.

JUDA GLASNER, *et al*,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE, JUDA GLASNER.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Page

Encyclopedia

Rules

Statutes

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Introductory.

Plaintiff, David Erlich, instituted this action August 14, 1964 [Tr. p. 126] as an individual against several defendants, including appellee, Juda Glasner.

The instant brief is solely on behalf of appellee Glasner.

Appellees' respective motions for summary judgment of dismissal having been granted for reasons fully set forth in the trial court's opinion [Tr. pp. 106-112] and judgment thereon having been entered October 30, 1967 [Tr. pp. 116-118], plaintiff appealed from said judgment by notice filed November 7, 1967. [Tr. p. 119.]

Two prior judgments of dismissal were reversed, the first (*Erlich v. Glasner,* 9 Cir., 1965, 352 F.2d 119) on the basis of failure to specify the reason or reasons

therefor and with the suggestion that amendment might be sought of appellant's complaint; and the second (*Erlich v. Glasner*, 9 Cir., 1967, 374 F.2d 681) on the basis that, as an affidavit had been filed by appellee Zilberstein, the granting of a motion for dismissal was erroneous since the trial court had not expressly excluded the affidavit and hence the matter should have been disposed of as a motion for summary judgment.

The instant proceedings were had and disposed of as motions for summary judgment.

Following remand on the first appeal, appellant filed an amended complaint which constitutes his present pleading. [Tr. pp. 2-7.] Said pleading is not verified. [Tr. p. 7.]

Jurisdiction as Claimed by Appellant in the District Court.

Appellant's pleading is entitled "Amended Complaint For Violation of Civil Rights (42 USCA 1983)". By paragraph I thereof, appellant alleged [Tr. p. 2] that the District Court "has jurisdiction of this cause pursuant to 28 USCA 1343(3) which provides for actions to redress the deprivation, under power of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States; and pursuant to 28 U.S.C.A. Sec. 1331 which provides for actions arising under the Constitution of the United States", followed by allegation that the amount in controversy exceeds $10,000.00 By paragraph IX of his amended pleading, appellant alleged [Tr. p. 6] that defendants' interference with the business of West Coast Poultry Company [a corporation—Tr. p. 3 "III"] is a direct interference with plaintiff's right to operate his business and earn

a livelihood for himself and family and that defendants' acts "deprived plaintiff of his privileges and immunities, guaranteed to him as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States;" and proximately caused damage and injuries to "his right and ability to earn a livlihood [sic] for himself and family, all to plaintiff's damage in the sum of $250,000.00."

The foregoing statutes and constitutional provision are those which appellant alleged as a basis for the jurisdiction of the District Court in this cause.

Statement of the Case.

Appellant is the sole plaintiff and his action was brought and is sought to be maintained by him solely as an individual.

Appellant evidently claims that he had been deprived of his *privileges and immunities* as a citizen of the United States guaranteed to him as such under the Constitution, Amendment 14, section 1. [Tr. p. 6, "IX", as heretofore stated.]

Appellant's claimed jurisdictional basis is as above noted. The remaining allegations of his amended pleading are as follows:

From November, 1947, to August, 1960, appellant was engaged in the business of slaughtering and dispensing poultry, kosher and non kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company. [Tr. p. 3, "II".]

In August, 1960, West Coast Poultry was organized as a California corporation. Appellant and his wife own

all the stock of said corporation. Appellant is president and general manager of the corporation. It is a continuation of the poultry business of plaintiff at the same address. [Tr. p. 3, "III".]

Defendants Glasner, Etner and Zilberstein are "doing business" under the fictitious name of United Orthodox Rabbinate of Greater Los Angeles. [Tr. p. 3, "IV".]

Defendant Glasner is employed by the Department of Public Health of the State of California as the kosher food law representative and his duties consist of investigation of violations of the kosher food laws of the State of California pursuant to §383b of the California Penal Code. [Tr. p. 3, "V".]

Defendants contend that they are Orthodox Rabbis and that only they should have control to "dictate" what is and what is not kosher. Defendants' "purposes" "is to prevent plaintiff and other kosher poultry dealers from using the services of any other rabbi except themselves" and to compel plaintiff and others to retain only defendants' services. [Tr. p. 3, "VI".]

To compel kosher poultry dealers in Los Angeles County to retain defendants' rabbinical services, defendant Glasner, "acting in his capacity as kosher food law inspector of the State of California, but not within the course of his duties as kosher food law representative", has caused issuance of criminal complaints charging violations of California Penal Code, §383b, to those dealers who do not use defendants' rabbinical services. [Tr. p. 4, "VII".]

On or about April 1, 1964, defendant Glasner, "while acting in his official capacity as kosher food law representative of the State of California, but not within

his duties as kosher food law representative," and all defendants, acting under color of law, entered into an "unlawful" combination and conspiracy for the purpose of depriving plaintiff of his privileges and immunities guaranteed every "citizen" of the United States by the Constitution, Amendment 14, section 1, and in pursuance thereof, have committed the following acts: (a) Communicated with customers of "plaintiff and West Coast Poultry Company, a California corporation," and advised them that if they purchased kosher products from plaintiff or said corporation citations would be issued against them by defendant Glasner for violating Penal Code §383b. (b) Circulated advertisements in newspapers advising the public not to purchase plaintiff's kosher products. (c) Filed two criminal complaints against plaintiff, "falsely accusing him of violating §383b of the Penal Code." (d) Filed criminal complaints against employees of plaintiff and West Coast Poultry Company, a corporation, "falsely charging them with violating" California laws to coerce these employees to leave said employment. (e) Charged one Abramovitz, who was employed as "schoichet" and West Coast Poultry Company in the Los Angeles Municipal Court with aiding and abetting poultry dealers with violating Penal Code §383b and in the Beverly Hills Municipal Court with violating Penal Code §240 and Health & Safety Code §26518.5, with the result that said Abramovitz left the employ of plaintiff rather than be a "constant defendant in criminal actions." (f) Filed a criminal complaint against one Glickman, "a schoichet employed by plaintiff and West Coast Poultry Company," charging him in the Los Angeles Municipal Court with aiding and abetting unidentified kosher butchers to violate Penal Code §383b and as a result

Glickman left said employ (g) Offered payment to Salter and Reyna, "former employees of the plaintiff," to appear as witnesses against plaintiff and falsely testify that he is not slaughtering chickens pursuant to orthodox Hebrew religion requirements. (h) Defendants Orlanski and Friedman were former employees of plaintiff; defendant Glasner caused to be issued in the Los Angeles Municipal Court a criminal complaint charging them with aiding and abetting kosher poultry dealers with violating California Penal Code §383b; "the remaining defendants" advised the defendants Orlanski and Friedman that if they would cooperate with them against plaintiff the criminal complaint would be dismissed. (i) Entered into a champertous agreement with three competitors of "plaintiff and West Coast Poultry Company" to commence an action against West Coast Poultry Company for an injunction to prevent that corporation from selling kosher poultry unless they retained defendants' rabbinical services; such action was commenced in the Los Angeles Superior Court, being action No. 825,740 said three competitors have no interest in said action and commenced it at defendants' request; said action is sponsored and financed by defendants. [Tr. pp. 4-6, "VIII".]

The interference by defendants "with the business of the West Coast Poultry Company is a direct interference with the right of the plaintiff to peacefully operate his business and earn a livlihood [sic] for himself and his family" and the defendants' acts "under color of law as hereinabove set out deprived the plaintiff of his privileges and immunities, guaranteed to him as a citizen of the United States by Section 1 of Amendment 14 of the Constitution of the United States," and as a proximate result of the "overt acts hereinabove

set forth, plaintiff has sustained damages and injuries to his business and right and ability to earn a livlihood [sic] for himself and his family, all to plaintiff's damage in the sum of $250,000.00." [Tr. pp. 5-6, "IX".]

The conduct of defendants was "opprobrious, wilful and malicious" and plaintiff requests punitive damages of $100,000.00. [Tr. p. 6, "X".]

These constitute the allegations of plaintiff's unverified amended complaint.

Notice of motion for dismissal of amended complaint and for entry of summary judgment was filed August 25, 1967, by appellees Orlanski, Friedman, Zilberstein, Bauman, Adler, and The United Orthodox Rabbinate of Greater Los Angeles. [Tr. pp. 50-51.] Among other things, the notice referred to the previously filed affidavit of Zilberstein. [Tr. pp. 8-17.] Appellee Glasner's notice of motion to dismiss [Tr. pp. 23-25] was subsequently amended, by document filed August 11, 1967, to a notice of motion for judgment on the pleadings or in the alternative for summary judgment or both. [Tr. pp. 32-34.] The affidavit of Quimby [Tr. pp. 35-37] and the affidavit of Glasner [Tr. pp. 45-49] were presented in support. Reference also was made to the Zilberstein affidavit. On September 1, 1967, appellant filed his affidavit in opposition to the motions for summary judgment [Tr. pp. 52-62], annexing thereto some 13 exhibits—including copy of declarations of Abramowitz and Orlanski dated August 8, 1963, which were presented in a California Superior Court suit, uncertified transcription of testimony in 1961, uncertified transcription of a hearing had by a deputy district attorney, etc. [Tr. pp. 63-92.]

Following hearing, argument and consideration of the various matters presented, the trial court rendered its opinion. [Tr. pp. 106-112; *Erlich v. Glasner,* 274 F. Supp. 11.] The opinion of the trial court concludes with:

> "Accordingly, the court grants defendants' motions for summary judgment having concluded that there is no triable issue of fact. Since this opinion sets forth the basis for the court's ruling, no findings of fact and conclusions of law shall be required. Counsel for defendants are directed to prepare a form of judgment pursuant to Rule 7 of the Local Rules of this court."

Judgment accordingly was had and entered from which plaintiff appealed as aforesaid.

The trial court's ruling was predicated on two separate bases: (1) the lack of appellant individual's standing to sue for alleged interference with the corporation's business; and (2) immunity of appellee Glasner, California State Kosher Food Law Representative, in regard to appellant's claim. These will be discussed in the foregoing order.

ARGUMENT OF THE CASE.

I.

Lack of Appellant Individual's Standing to Sue for Alleged Interference With Corporation's Business.

In paragraphs II and III of his amended pleading, appellant alleges that from November, 1947, until August, 1960, he was engaged in the business of slaughtering and dispensing poultry, kosher and non-kosher, at a certain address in Santa Monica, California, under the fictitious firm name of West Coast Poultry Company; that in August, 1960, West Coast Poultry Company was organized as a California corporation; that appellant is president and general manager of said corporation; and that the corporation is a continuation of said poultry business. [Tr. p. 3, "II" and "III".]

It appears that since August of 1960 the business involved has been and is that of the corporation, West Coast Poultry Company. It also appears that the alleged acts are asserted to have taken place on or about April 1, 1964 [Tr. p. 4, line 10], at a time when the corporation was thus conducting the business.

It is true that appellant alleged that he is one of the two stockholders of the corporate stock and that he is the president and general manager of the corporation. However, this does not make the business activities or customers or other business affairs those of appellant as an individual. These are and belong to the corporation which is the concern carrying on the business as alleged in appellant's pleading.

Appellant, as an individual, is the sole party plaintiff. It is evident that he seeks to ignore the corporate

entity. That may not be done by him, either as stockholder or president or general manager. Appellant has no right, as an individual, to sue for redress of that which is the corporation's concern. These are the corporation's affairs, not appellant's.

"The fact that a stockholder owns all, or practically all, or a majority of the stock, does not of itself authorize him to sue as an individual." (13 Flecher Cyc. Corp., 1961 ed., p. 366, §5910; *Green v. Victor Talking Machine Co.,* 2 Cir., 1928, 24 F.2d 378, 380.) As observed in the anti-trust suit in *Skouras Theatres Corp. v. Rado-Keith-Orpheum Corp.,* D.C., S.D.N.Y., 1961, 193 F.Supp. 401, 407:

> ". . . In legal contemplation, the motion picture theatres injured by the alleged conspiracy were under control of the three sublessee corporations, and only those corporations were entitled to redress of the wrongs inflicted. The fact that plaintiffs were the landlords of the theatres avails them naught. [Citations.] Nor is plaintiffs' ownership of the sublessee corporations of any aid, for even a shareholder who owns the corporation cannot sue in its stead. [Citations.] Nor are plaintiffs' direct dealings with the defendants and their management of the business of the sublessees sufficient to confer upon them standing. 'Shareholders and officers of corporations as well as creditors and landlords have been held not to have standing to sue for treble damages.' [Citations.] The fact that plaintiffs have more than one of the above statures does not lead to the conclusion that they have standing to sue. Plaintiffs created corporations to hold the theatres under subleases in

order to obtain the benefits of such an arrangement. They may not now successfully pierce the veils of the corporate sublessees to avoid the burdens of the arrangement."

As expressed in *Southern Carolina Council of Milk Producers, Inc. v. Newton,* D.C., A.D.S.C., 1965, 241 F.Supp. 259, 263, the rule is "an effective bar to suits by shareholders, officers, employees, and creditors, for personal losses caused by injury to the corporation. The cause of action accrues only to the corporation for which it can bring suit, or by a shareholder's derivative suit." To allege that the acts of a defendant or defendants have caused impairment or even destruction of the corporation's business or assets, thereby rendering the stockholders' property less valuable or valueless or a creditor less secure or without security or an employee with lessened or no employment, does not invest any of these persons with a right to sue for the same. (*Ibid.*, and cases cited; see also, *Gagnon v. Nevada Desert Inn,* 1955, 45 Cal.2d 448, 289 P.2d 466; *Toboni v. Pennington Millinery Co.,* 1959, 172 Cal. App.2d 47, 341 P.2d 845; *Cromelin v. Fulcher,* 5 Cir., 1951, 192 F.2d 40; *Brictson v. Woodrough,* 8 Cir., 1947, 164 F.2d 107, cert.den. 334 U.S. 849, 68 S.Ct. 1500, 92 L.ed. 1772.) In *Fleischer v. Paramount Pictures Corporation*, 2 Cir., 1964, 329 F.2d 424, cert.den. 379 U.S. 835, 85 S.Ct. 68, 13 L.ed.2d 43, it succinctly was stated to be "clear that Fleischer may not secure a personal recovery for an alleged wrong done to his corporation."

Appellant argues that, while only natural persons are entitled to "privileges and immunities" under section 1 of the 14th Amendment (which is the basis of his

suit), nevertheless a corporation is a "person" within the meaning of due process and equal protection clauses of that Amendment (neither of which clauses is here involved); that a "person's" business whether corporate or individual is a property right; that shares of stock are personal property the ownership of which entitles one to earnings and assets after dissolution; and "since the value of shares is determined by the corporation's assets and earnings, any impairment of the corporation's property or its earning power reduces the value of the stock and proportionately diminishes the value of the shareholders' property"—the very arguments which have been made and rejected in the rationale of the foregoing decisions. Appellant's argument that he, as an individual, has the right to maintain a suit for diminution of the corporation's assets or earnings—since he and his wife (who is not a party hereto) own all outstanding shares of the corporation—is directly contrary to the established law of which the foregoing decisions are representative.

The very allegations of appellant's amended complaint demonstrates that he seeks recovery of damages for claimed injury to the business of the corporation. He may not do so as an individual.[1]

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[1]Not made a basis of the trial court's decision but nevertheless of interest is the fact that, as alleged in the amended pleading, the corporation is a California corporation. Section 834, California Corporations Code, regulating the ringing of suits for redress of wrong committed against a corporation, is not merely procedural but is held to apply to an action brought in the federal courts. (*Koster v. Warren*, 9 Cir., 1961, 297 F.2d 418, 419, citing *Cohen v. Beneficial Industrial Loan Corporation*, 1949, 337 U.S. 541, 69 S.Ct. 1221, 93 L.ed. 1528; see also *Hausman v. Buckley*, 2 Cir., 1962, 299 F.2d 696, 700 et seq.) The courts hold that the corporation's "rights, not those of the nominal plaintiff, are to be adjudicated, and the court has no jurisdiction to adjudicate its rights in its absence as a party." (*Beyerbach v.*

Appellant's suit is not a derivative suit on behalf of the corporation although the damages claimed are for interference with the corporation's business. His suit is in his own name as an individual. He cites *Sutter v. General Petroleum Corp.,* 1946, 28 Cal.2d 525, 170 P.2d 898, for the proposition that "a cause of action may exist in favor of both the corporation and the stockholder." In *Toboni, supra,* 172 Cal.App.2d at 51, 341 P.2d at p. 348, it pertinently was said:

> "Plaintiff mistakenly relies upon *Sutter v. General Petroleum Corp.,* 28 Cal.2d 525 [170 P.2d 898, 167 A.L.R. 271]. It does not support her thesis. There the plaintiff sued for damages directly and individually sustained by him, caused by the fraud of the defendant which induced plaintiff to organize and invest in a corporation to take over an oil and gas lease and abandon his own petroleum development projects. The stock in the new corporation thus formed became valueless because of that fraud. The Supreme Court carefully distinguished that case from the case of a stockholder's derivative suit, saying in part:
>
> " 'Generally, a stockholder may not maintain an action in his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock and the stock of the other stockholders, for such an action would authorize multitudinous litigation and ignore the corporate entity. Under proper circumstances a stockholder may bring a representative action or

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Juno Oil Co., 1954, 42 Cal.2d 11, 28, 265 P.2d 1, 11; *Keller v. Schulte,* 1957, 47 Cal.2d 801, 803, 306 P.2d 430, 432.) Appellant has not complied with section 834 of the California Corporations Code.

> derivative action on behalf of the corporation. [Citations.] . . . '. . . The action is derivative, i.e., the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (28 Cal.2d 530.)" (Omitting emphasis of Court.)

In his brief, appellant Erlich argues that defendants are "interferring with the plaintiff's right to earn a living by attempting to compel him to operate his business" in a certain manner. He states that the "right to earn a living" is a property right guaranteed under the due process clause of both the Fifth and Fourteenth Amendments to the Federal Constitution, although nowhere in his pleadings (or otherwise) did he invoke said due process clauses. In essence, appellant at great length argues that *his* business and *his* right to earn from that business are somehow involved because he and his wife are stockholders of the corporate stock and he is the president and general manager of said corporation. *Nowhere, however, does it appear that appellant himself is engaged in business.* It expressly and affirmatively is alleged by appellant's very own pleading that *the corporation* was formed in 1960 and is a continuation of the business formerly conducted by appellant. It is the corporation's business—not any business of appellant—that is being conducted by the corporation. If there be any "interference" with that business or with the stockholder's right to earn a "livelihood" therefrom, it is an interference with the corporation's affairs, not with appellant's individual

rights. Appellant confuses that the fact that there is a corporate entity and makes assertions that alleged interference with the corporation constitutes interference with him as an individual. He, as an individual, cannot ignore the corporate entity or the fact that it is the corporation (not appellant) which is conducting the business.

Of course, the *owner* of a business has a property right therein with the right to make profit (livelihood) therefrom But *appellant* is not the *owner*; it is the *corporation,* West Coast Poultry Company, that is the *owner* of and conducting said business; and appellant's status, whether as a stockholder or president or general manager of that corporation, does not give appellant any right as an individual to seek redress for any alleged wrong done to the corporation's business.

For example, *Royal News Company v. Schultz,* U.S.-D.C., Mich., 1964, 230 F.Supp. 641, relied on by appellant as supportive of his right as an individual, was an action for injunction brought *by the corporation* whose products (books) unlawfully had been seized, thus depriving the corporation of its property without due process of law. The suit was by the corporation, not by any stockholder or officer or employee and the decision nowhere purports to invest any of these latter individuals with any right to seek redress as individuals for that which had been done to the corporation.

In his concluding discussion of this matter, appellant claims (O. B. pp. 32-33, "C") that there are two allegations made of "overt acts" done "directly to plaintiff, rather than through his corporation." He states that his pleading alleges that the defendants communicated with customers of the plaintiff. However, the al-

legations of his pleading show that West Coast Poultry Company, a corporation, was and is conducting said business. The reference in the pleading to "customers of the plaintiff and the West Coast Poultry Company, a California corporation", contained in the referred to paragraph VIII of appellant's pleading [Tr. p. 4, lines 19-20] clearly and obviously is a reference to customers of the business conducted by the corporation—for that is the only business alleged to exist in the pleading. His second claimed "direct" overt act, "that criminal complaints were filed against the plaintiff and not against the corporation", refers to the allegation that two criminal complaints were filed against plaintiff for violation of California Penal Code, section 383b. [Tr. p. 4, lines 27-28.] (See *Erlich v. Municipal Court,* 1961, 55 Cal.2d 552, 11 Cal.Rptr. 758, 360 P.2d 334, upholding the constitutionality of the statute and refusing to prohibit prosecution of appellant thereunder.) Certainly, Civil Rights legislation does not give any citizen the right to be immune from criminal charges being filed against him. The mere filing of such charges could not possibly have deprived appellant of any civil right. Appellant's pleading does not allege whether he ultimately was found guilty or not guilty of the charges. If found guilty, he was not deprived of any civil right. (He does not claim that he was abused or mishandled, physically or mentally, or was deprived of counsel, etc., by appellee Glasner or any other official or any of the defendants.) If found guilty, he was not deprived of any civil right for he violated section 383b, California Penal Code, in such event. His allegation that two criminal charges were filed against him does not allege any violation of any of his civil rights.

By paragraph IX of his pleading [Tr. p. 5, lines 7-10], appellant alleges, "That the interference by these defendants *with the business of the West Coast Poultry Company*", which elsewhere is alleged to be a California corporation, "is a direct interference with the right of the plaintiff to peaceably operate his business and earn a livelihood [sic] for himself and his family". (Italics added.) It is on this basis that he claims in his said pleading that his "privileges and immunities" have been infringed. It is plain that what he seeks as an individual is redress for alleged interference with the business of the corporation. Appellee Glasner's counsel submit that the trial court's decision correctly held [Tr. p. 3, line 12 to p. 4, line 20; *Erlich v. Glasner, supra,* 274 F.Supp. at pp. 12-13]:

> "As heretofore pointed out, the very essence of the amended complaint here is that plaintiff, an individual, has been deprived of his right to make a livelihood because the corporation in which he and his wife owned stock has been injured through the efforts of persons alleged to be conspirators, one of whom is the Kosher Food Law Representative of California acting under color of state law. Plaintiff's suit under the Civil Rights Act as a stockholder for damage to the corporation and damage he claims ensued to him as a stockholder cannot be sustained. Since a corporation and a stockholder are separate legal entities, a suit may not be maintained by a stockholder for damages to a corporation except in a derivative suit. (*Green v. Victor Talking Mach. Co.* (2 Cir.), 24 F.(2d) 378; *Brictson v. Woodrough* (8 Cir.),

164 F.(2d) 107; *Eagle v. Horvath* (S.D.N.Y.), 241 F.Supp. 341; *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.* (S.D.N.Y.), 193 F. Supp. 401.) Furthermore, a corporation may not sue under the Civil Rights Act. (*Hague v. C.I.O.*, 307 U.S. 496.) Nor would it appear that any derivative suit can be sustained under such Act. Leaving aside other questions, a suit by one stockholder could lead to a multiplicity of suits and uncertainty as to the distribution of damages recovered.

"To hold that a stockholder or, for that matter, an officer or employee of a corporation may sue for violation of his civil rights when he claims damage because of damage done to his corporation by the action of some person under color of law would lead to absurd results and endless litigation.

"The affidavits and documents on file make it clear that plaintiff's case is grounded on the premise that defendant Glasner, the Kosher Food Law Representative of California, and the other defendants have conspired to injure the West Coast Poultry Company and in so doing injured plaintiff as a stockholder. This, it is asserted, constitutes a deprivation of plaintiff's right to a livelihood.

"It must be concluded that the amended complaint does not state a claim upon which relief can be granted and that there are no facts contained in the affidavits and documents on file which entitle plaintiff to relief."

It is submitted that the matters discussed in this Point I alone suffice to sustain the trial court's judgment and that said judgment may and should be affirmed thereon.

II.

Immunity of Appellee Glasner, California State Kosher Food Law Representative.

As a second or alternative basis for its ruling, the trial court stated [Tr. p. 109; *Erlich v. Glasner, supra,* 274 F.Supp. at p. 13] :[2]

> "Another ground in support of the motions by defendants is that of the immunity or defendant Glasner because of being a state officer. In a similar case in which Glasner was sued, the California Court of Appeal held that he was immune. (*Glickman v. Glasner,* 230 Cal.App.2d 120, 40 Cal.Rptr. 719.) The court pointed out that Glasner's activity was within his discretionary duties and that he was immune from tort liability. A footnote to that opinion sets out the California State Personnel Board specifications for a Kosher Food Law Representative."

The trial court in the opinion and decision under review then quoted as footnote 1 the specifications which herein are reproduced as an appendix to this brief.

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[2]Appellee Glasner's counsel submit that this second or alternative basis equally sustains the ruling made. If either basis sustains the ruling, it should and must be affirmed. As expressed by this Court in *S & S Logging Co. v. Barker,* 9 Cir., 1966, 366 F.2d 617, 623: " 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it *must be affirmed,* although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran,* 302 U.S. 238, 58 S.Ct. 154, 158, 82 L.ed. 224. (Emphasis added.)"

Noting that whether a similar holding under the Civil Rights Act would follow was not "entirely clear", the trial court referred to and discussed certain authorities (*Hoffman v. Halden,* 9 Cir., 1959, 269 F.2d 280; *S & S Logging Co. v. Barker,* 9 Cir., 1966, 366 F.2d 617; *Norton v. McShane,* 5 Cir., 1964, 332 F.2d 855; and *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.ed.2d 288), and then stated [Tr. p. 111; *Erlich v. Glasner, supra,* 274 F.Supp. at p. 14]:

> ". . . Here, we are dealing with a state representative acting within his discretionary duties and whether or not in so acting he is clothed with immunity from liability under the Civil Rights Act. To hold that the Kosher Food Law Representative or anyone in a similar position is required to establish his good faith in court after his activity was within his discretionary duties would lead to endless harassment and ultimate frustration in carrying out his duties. It is, therefore, concluded that defendant Glasner's activity falls within the letter of his discretionary duties and that he is clothed with immunity under the circumstances of this case."

It is submitted that the ruling of the trial court comes squarely within the rationale of the authorities.

As kosher food law representative of California, appellee Glasner has immunity from suit in the performance of his duties which rule "applies not only to acts essential to the main purposes for which the office was created but also to acts which, although incidental and collateral, serve to promote those purposes. (*White v. Towers,* 37 Cal.2d 727, 733 [235 P.2d 209, 28 A.L.R. 2d 636].)" (*Lipman v. Brisbane Elementary Sch.*

Dist., 1961, 55 Cal.2d 224, 233, 11 Cal.Rptr. 97, 102, 359 P.2d 465, 470; *Tietz v. Los Angeles Unified Sch. Dist.,* 1965, 238 Cal.App.2d 905, 909-910, 48 Cal.Rptr. 245, 248, appeal dismissed and cert. den., *Tietz v. Marienthal,* 385 U.S. 8, 87 S.Ct. 53, 17 L.ed. 7, reh den 385 U.S. 964, 87 S.Ct. 389, 17 L.ed. 309.) That the kosher food law representative of California is immune from liability for discretionary acts and that his prescribed duties are discretionary in nature are well discussed and considered in *Glickman v. Glasner,* 1964, 230 Cal.App. 2d 120, 40 Cal.Rptr. 719. As there held in part:

> " '. . . Those duties specifically include advising interested persons "such as kosher meat and poultry packers, wholesalers, retailers, and restauranteurs on application of the State Kosher Food Law * * *" The Kosher Food Inspector also "conducts investigations, gathers, assembles, and reports facts and evidence." . . .
>
> " 'These duties obviously involve the exercise of discretion. In carrying out the obligations of his office, the inspector must decide what facts he shall gather, which investigations will be made, and what reports in his reasoned judgment should be made to bring about compliance with Penal Code Section 383b. [Citations.]
>
> " '. . .
>
> " 'The principle established by these cases may work hardship from time to time, but were the rule otherwise greater mischief would result. . .' "

It may be true that, as said in appellant's brief, the state law or rule of decision regarding immunity is not binding when determining that matter under the Federal Civil Rights Act. However, the state court's ruling

of the discretionary nature of the official's duties should be entitled to great weight, if not conclusive, upon that matter.

In *Barr v. Mateo,* 1959, 360 U.S. 564, 571-572, 79 S.Ct. 1335, 3 L.ed.2d 1434, the Supreme Court, in discussing the matter of immunity, referred to the noted decision by Judge Learned Hand in *Gregoire v. Biddle,* 2 Cir., 1949, 177 F.2d 579, the Supreme Court stating:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter as been admirably expressed by Judge Learned Hand:
>
> " 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to subject all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or

the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the better end to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . .

" 'The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by the saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . .' *Gregoire v. Biddle* (CA2 NY) 177 F.2d 579, 581.

The Supreme Court continued thereafter with (360 U.S. at pp. 572-573):

> "We do not think that the principle announced in Vilas can properly be restricted to executive officers of cabinet rank, and in fact it has never been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierachy."

On page 575 of its decision, the Supreme Court held, *"The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, . . ."* (Italics added.)

So much has been quoted from *Barr* because of its sound reasoning and obvious applicability to most of appellant's arguments and contentions.

In *S & S Logging Co. v. Barker,* 9 Cir., 1966, 366 F.2d 617, 620, this Court, having quoted from *Barr's* quotation of *Gregoire,* stated, "Judge Hand's statement was again alluded to with approval in the recent case of *Garrison v. State of Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.ed.2d 125. The complaint here states clearly what it is claimed that the defendants did. . . . These were acts which were clearly within the perimeter of those defendants' duties or, as put by the Fifth Circuit

in *Norton v. McShane,* 332 F.2d 855, 857, they were 'acting within the scope of their authority or in the discharge of their duties.'" It further was held: "This immunity from suit granted to governmental employees is not limited to those of cabinet rank, nor to those exercising judicial or quasi-judicial functions." Quotation was made again from *Barr,* following which it was said: "And in *O'Campo v. Hardisty,* 9 Cir., 262 F.2d 621, 625, a suit against employees of the Internal Revenue Service, we said: 'At an early date the rule was extended to protect legislative and administrative officers. * * * That minor governmental officers are within the scope of immunity is well established." (See also *Bershad v. Wood,* 9 Cir., 1961, 290 F.2d 714, which also noted on page 717, "the delicate balance that must be struck between private injury and public interest"; *Scherer v. Brennan,* D.C.N.D. Ill., E.D., 1966, 266 F. Supp. 758, 761.)

In his brief, appellant relies upon *Robichaud v. Ronan,* 9 Cir., 1965, 351 F.2d 533, a case which this Court discussed in footnote 2 on page 620 of *S & S Logging v. Barker, supra,* 366 F.2d 617, as follows:

> "2. 'The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts.' *Norton v. McShane,* 5 Cir., 332 F.2d 855, 859. Footnote 5 in that opinion contains an extensive list of administrative officers who have been held immune from suit. In *Robichaud v. Ronan,* 9 Cir., 351 F.2d 533, this court held that a prosecuting attorney who acted, not as such, but as a policeman, was not immune from suit under the Civil Rights Acts. As that suit arose under those Acts [citation] the

> case is not in point here. In its general discussion of the immunity rule, the court assumed that the immunity was related to acts 'committed by the officer in the performance of an integral part of the judicial process.' This apparent assumption was unnecessary to that decision and it must have been inadvertent for it is plainly contrary to the statements quoted above from *Barr v. Mateo* and *O'Campo v. Hardisty* and contrary to the other cases listed in *Norton v. McShane,* supra."

Robichaud does not aid appellant particularly in view of this Court's statements that it erred in assuming that the acts must have been an integral part of the judicial process in order to afford immunity. *Agnew v. Moody,* 9 Cir., 1964, 330 F.2d 868, upheld the immunity of court officials and attaches and did not hold in accordance with appellant's statement made on page 11 of his brief. Appellant cites and relies upon *Monroe v. Pape,* 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.ed. 2d 492, *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.ed.2d 288, and *Cohen v. Norris,* 9 Cir., 1962, 300 F.2d 24, each of which concerned activity of policemen. Appellee Glasner, contrary to appellant's thesis, is not and never was a policeman; he was the duly appointed, qualified and acting Kosher Food Law Representative of the California Department of Public Health; and his actions were clearly within the perimeter of his duties as such. (See quotation, supra, from *S & S Logging Co. v. Barker,* 9 Cir., 366 F.2d at p. 620.) *Monroe* involved police brutality and mistreatment; *Cohen* involved unwarranted search and seizure by policemen, coupled with an assault on plaintiff's person; and both involved claimed violation of due process clauses, which

is not here the situation. *Pierson* points out that policemen at common law were always subject to suits for torts committed in the performance of their duties, with the right of defense of good faith and probable cause. *Pierson* does not hold and does not intimate that rules of immunity applicable to judicial, legislative and administrative officials, even those not of cabinet status, has been changed or altered or no longer exists. *Pierson* merely applied existing principles applicable to policemen in tort cases to policemen in Civil Rights suits. And, in *Pierson,* it also was noted (18 L.ed.2d at p. 295): "Monroe v. Pape presented no question of immunity, however, and none was decided." Contrary to appellant's statement on page 10 of his brief, this Court did not overrule *Hoffman v. Halden*, 1959, 9 Cir., 268 F.2d 280, in regard to its holding of immunity of defendant Wair, Superintendent of the Oregon State Mental Hospital, but only overruled the statement on page 292 of that opinion to the effect that a purpose to discriminate or to deprive one of a federal right was an element to be alleged by the plaintiff. (See *Cohen v. Norris, supra,* 300 F.2d at pp. 29-30.) In *Hoffman,* judgment of dismissal was affirmed as to defendant Wair but reversed as to others. *Cohen* did not overrule the decision thus made. Appellant also cites and relies upon *Herbert v. Morley*, D.C.C.D.Cal., 1967, 273 F. Supp. 800. While upholding a right to maintain a Civil Rights Act suit against policemen (who were exonerated at trial), the Court there further made a ruling which supports appellee Glasner and which is contrary to appellant's position. Thus, on page 802, it there is stated:

> "The complaint as against Harold Kade, M.D., the Los Angeles County autopsy surgeon and deputy coroner, was dismissed before trial on a mo-

tion for summary judgment, the Court finding that at all times mentioned in the complaint he had acted reasonably and within the permissible discretion of his official capacity, and was therefore immune from the charges of the complaint.

"This order for summary judgment in favor of Dr. Kade was based, of course, upon the traditional immunity from suit granted by the common law to a public official engaged in discretionary activities, reasonably performed within the appropriate scope of his official authority and capacity. Here Dr. Kade had full and complete statutory authority and capacity, as holder of the public office of autopsy surgeon and deputy coroner, to conduct the autopsy, make the findings and report his opinions exactly as he did in the course of his duties.

"Dr. Kade's activities complained of by plaintiff consisted of his autopsy made upon the body of a person who had died after a fall in a bar fight with plaintiff and a later fall at the Santa Monica police station; his set of findings and opinions that the primary cause of death was the blows and fall at the bar; his expression of these findings and opinions to the police officers investigating the death; and his testimony at plaintiff's trial for murder in the course of which Dr. Kade as an expert stated his opinion that the blows and fall the deceased had suffered in the bar fight with plaintiff could have caused the death.

"When the activities of Dr. Kade were measured by his statutory discretion, and the scope of his official authority, capacity and duties as dep-

> uty corner and autopsy surgeon, the Court necessarily found his immunity from suit so compelling that as a matter of law he was dismissed from the action."

How appellant may claim that the foregoing decision aids or supports his position herein is difficult to see. It does not aid or support appellant but does support appellee Glasner, the Kosher Food Law Representative of California.

The decisions relied on by appellant did not involve discretionary action of a state administrative official, such as appellee Glasner, California State Kosher Food Law Representative. Each and every act charged against appellee Glasner was and is "within the outer perimeter of [his] line of duty" and he has and is entitled to immunity from the fear of civil damage suit in regard thereto. (*Barr v. Mateo, supra,* 360 U.S. 564, 575. See also pp. 570-572.)

The basic and fundamental reasons for governmental official's immunity in performance of the discretionary duties annexed to his office here are present. Under numerous authorities, some of which are cited herein, that immunity also sustains the trial court's judgment. (For additional authorities and argument, see Brief for Appellee, Juda Glasner filed in Case No. 20982, *Erlich v. Glasner,* 9 Cir., 374 F.2d 681.)

III.

Appellant's Attack on Sufficiency of Affidavits.

Appellant attacks the sufficiency of the affidavits in support of the alternative motion for summary judgment. It must be remembered that the motions were predicated not only on the affidavits but also upon the records and files of the cause which latter furnished many of the facts upon which judgment of dismissal and summary judgment properly was had.

In the Quimby affidavit, it was pointed out that this action was brought in the name of plaintiff, David Erlich, as an individual, and that the amended complaint is "based upon an alleged 'interference by these defendants with the business of West Coast Poultry Company, a corporation.'" It further was pointed out that the matters involved were those of the corporation, not of the individual plaintiff. [Tr. p. 35, lines 22-29.] The affidavit further called attention to the decision made in *Glickman v. Glasner, supra,* 230 Cal.App.2d 120, and its holding that the acts done by defendant Juda Glasner, kosher food inspector for the Department of Health of the State of California, "were of a discretionary character" [Tr. p. 36, lines 12-26] and the trial court was requested to take judicial notice of the matters in said case. [Tr. p. 37, lines 6-14.]

The *Glickman* opinion sets forth the "California State Personnel Board Specification for Class of Kosher Food Representative", which is an official act of the Board made pursuant to California Government Code, section 18000, and which is judicially noticed (Rule 43(a), Fed.Rules Civ. Proc.), thereby showing the duties attached to the office of Kosher Food Law Representative. In *Cooper v. O'Connor,* D.C.Cir., 1938,

69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440, cert. den. 305 U.S. 642, 59 S.Ct. 146, 83 L.ed. 414, it was held (99 F.2d at p. 138), "we may properly take judicial notice of the official duties of each of the appellees and thus determine whether the acts charged in the declaration fell within the general scope of their authority." For convenience of this Court, said "California State Personnel Board Specification for Class of Kosher Food Law Representative" has been quoted and set forth in the Appendix to this brief. Although not appearing in the present transcript, it may be noted that a copy thereof was among the records and files of this cause. (See transcript in 9th Circuit, case number 19872, page 23.)

Among other things, the affidavit of appellee Glasner [Tr. pp. 45-49] set forth: At all time mentioned in the amended complaint, he was an ordained Orthodox Rabbi and the State Kosher Food Law Representative charged with statewise enforcement of the State Kosher Food Law, section 383b of the California Penal Code. He had and has the qualifications set forth in the State Personnel Board Specifications for the Class of Kosher Food Law Representative, Code 9034. Among the duties imposed on him were the conducting of field investigations of complaints regarding kosher foods alleged to be in violation of the State Kosher Food Law, making of reports, securing evidence, and assisting in the preparation of cases for prosecution when necessary. The specifications for the position also required that he be in good standing with a recognized California or national rabbinical body and he was a member of the United Orthodox Rabbinate of Greater Los Angeles in which the various Orthodox groups were

represented. He did not participate in the activities of the Rabbinate if they in any way appeared to be in conflict with the activities related to his position as Kosher Food Law Representative. However, should his office receive a complaint from a member of the Rabbinate or others, it was his duty to conduct investigation. He never attempted to prevent the use of the services of any Orthodox Rabbi or to compel use of the services of any specific Rabbi. He never caused or attempted to cause criminal prosecution of anyone by reason of the specific identity of the Rabbi or Rabbis whose services were being used. In fact, he had nothing to do with the certification of Rabbis. He did not cause issuance of criminal complaints but merely conducted investigations and presented the facts to the appropriate City Attorney or District Attorney's office for such action as that office might find appropriate. If the appropriate governmental representative of these offices saw fit to prepare a criminal complaint, he (Glassner) would by reason of his office sign the same. He did not communicate with customers advising the latter that they would be subject to prosecution if they purchased products from plaintiff or West Coast Poultry Company. He did direct communications to West Coast Poultry Company and other interested members of the industry advising them of the law. (Note: Appellant's own affidavit reveals that appellee Glasner sent advice that he had been advised that four named persons had been disqualified schochtim and that poultry slaughtered by a schochet who has been disqualified is non-kosher under Orthodox Hebrew law "and the sale of poultry slaughtered by a disqualified schochet may result in the prosecution of

the seller under Penal Code Section 383B." [Tr. pp. 76-77.] The advice of possible prosecution related to seller, not to purchaser, and nowhere did the advice refer to or mention either plaintiff or "his" corporation, West Coast Poultry Company.) He (Glasner) did not inform interested parties that if they purchased kosher products from plaintiff or West Coast Poultry Company that citations would be issued against them. The affidavit contains more facts but sufficient has been sent forth to show that he was acting within the perimeter of his duties as the State Kosher Food Law Representative.

Appellant's brief states that appellee Glasner places the responsibility of criminal prosecutions on the City or District Attorney "without any attempt to explain why plaintiff *presumably* was singled out as the defendant rather than West Coast Poultry Company, the corporation", etc. (O.B. p. 36.) There is no such presumption that plaintiff was singled out. He was president and general manager of the corporation and himself was subject to criminal prosecution for the violation of the California Kosher Food Law. There is no showing as to whether the corporation ever was or was not also criminally prosecuted. In *West Coast Poultry Co. v. Glasner*, 1965, 231 Cal.App.2d 747, 42 Cal. Rptr. 297, the corporation appealed from an adverse judgment. The opinion reveals that the corporation's complaint therein alleged, among other things, that Glasner "has filed complaints with the district Attorney charging appellant with violating the Penal Code, section 383b, although he knew full well that the establishment was kosher." This, of course, has nothing to do with the instant case. Appellant's statement is

a "red herring" which seeks to divert attention from that which controls and governs.

Of like ilk is appellant's statement on page 35 of his brief to the effect that appellee's affidavit is false wherein he set forth that he was aware that three companies (named and including Pines Poultry) commenced an action for injunction or similar relief against West Coast Poultry Company and that he (Glasner) contacted the attorney for plaintiffs therein to see if that action did develop evidence of violation of the Kosher Food Law "because affiant felt it his duty to do so" and that he did not enter into any agreement with any of said plaintiffs or in any way sponsor said action. Appellant refers to the so-called Goss affidavit which was but a copy of an affidavit made by Goss in a California suit (not herein) and was attached as Exhibit 11 to appellant's affidavit. [Tr. pp. 88-90.] It is extremely doubtful that this Exhibit 11 is anything other than pure hearsay on hearsay as here presented. (It is not even a certified copy of the state court affidavit.) Be that as it may, the Goss statement was to the effect that in June or July of 1963, "Rabbi Glasser" (query—would this refer to Rabbi Glasner?) came to Goss' market and asked whether Goss could compete with those not using the same process he did in koshering chicken; Goss replied "No"; he was asked if he thought it a good idea for the authorities to be shown his costs of koshering chicken so they would establish a fair-trade price and whether Goss would appear in a matter like that; Goss replied he would; three or four weeks later "Rabbi Glasser" telephoned and asked Goss if you would be in Mr. Silver's office at a certain time; Goss went there alone and waited;

sometime later "Rabbi Glasser" showed up; he asked the girl in the office where Mr. Silver was and she stated Silver was expected shortly; they waited a while and on inquiry made by "Rabbi Glasser" the girl said she could not find papers and suggested to Goss that he sign one in blank so he could leave; Goss was tired of waiting, signed the paper and left with "Rabbi Glasser"; near the elevator, they met a man to whom "Rabbi Glasser" introduced Goss stating the man was Mr. Silver; later, Goss read a clipping which stated that he and others were suing West Coast Poultry and others; he called "Rabbi Glasser" and said he did not want to sue anyone to which the Rabbi replied it must be a mistake. (This supports appellee Glasner that he did not advocate or sponsor the injunction suit.) The remainder of the Goss statement (if it may be considered at all) concerns Goss' actions with his own counsel in contacting Mr. Silver and opposing counsel in securing a withdrawal from or dismissal of the suit—in none of the latter of which any reference is made to any Rabbi. If anything, the Goss statement merely shows that a Rabbi had inquired concerning effective competition with those using a different process and whether costs should be shown to establish a fair-trade price and that the Rabbi, when subsequently informed that the suit mentioned had been brought, stated it was a mistake. This scarcely supports any of appellant's claims and certainly does not show any error in the trial court's determination made herein.

Finally, appellant's brief expresses umbrage at the fact that the affidavit of Glasner makes reference to the affidavit of appellee Zilberstein. The latter affidavit was one of the documents in the records and files

and obviously was a proper matter for consideration by the trial court in making its ruling. Whether it was or was not referred to in the Glasner affidavit does not make it any less a matter for consideration. The Zilberstein affidavit [Tr. pp. 8-17] is lengthy. It describes in detail the composition of the United Orthodox Rabbinate of Greater Los Angeles and its unincorporated association status as an ecclesiastical parent body of three orthodox groups located in the Los Angeles area, with one of its principle functions to concern itself with adherence to Hebrew statutes concerning dietary laws relating to Kosher foods and to issue warnings and take action against those who offend these laws. The Rabbinate is a non-profit body and rabbinical services rendered as an ecclesiastical body for enforcement of the Jewish dietary laws are rendered without compensation of any kind. It has the power and duty to disqualify a schochet who is slaughtering or processing Kosher meats contrary to that which is to be had. For example, in March of 1963, schochet Abromowitz was instructed by telegram sent in the name of the United Orthodox Rabbinate "to desist slaughtering of poultry if dressed thereafter in heated water." A second telegram was sent later advising that he was still violating the "Kashbruth instructions". No reply was received and thereafter an edict of disqualification was prepared and signed. (Note: appellee Glasner was not present and was not a signer of the edict.) The acts of the United Orthodox Rabbinate were done as an ecclesiastical body of Rabbis, duly authorized to consider the matter, to make a determination thereof and to render a decision and decree—all in accordance with and as required by Rabbinical

Law. The affidavit described the position of Schochet and the supervision to be made of a schochet. A complete reading of the Zilberstein affidavit reveals additional facts.

Appellant makes the statement that the court, not the ecclesiastical body, is the forum to determine the ecclesiastical question of whether the schochet is or is not complying with Hebrew religious laws in slaughtering and processing Kosher (or claimed Kosher) meats. That is incorrect, as a moment's reflection will reveal. The law permits ordained ministers, rabbis and priests to perform marriages which will be recognized by the civil governments. The civil authorities do not pretend to have the ecclesiastical right or duty to defrock or expel ordained persons. Only the ecclesiastical body has that right. If the latter has defrocked or expelled one who was ordained so that the latter no longer is an ordained minister, rabbi, or priest, certainly it cannot successfully be argued that the latter thereafter may perform any marriage which would be considered legal by civil authorities.

As observed by the trial court in its opinion [Tr. pp. 111-112; *Erlich v. Glasner, supra,* 274 F.Supp. at p. 14]:

> "This case presents another problem which, while not requiring a decision, warrants comment. Although plaintiff contends and defendants acquiesce that the state law under which defendant Glasner acted relates to dietary law rather than laws affecting religion, plaintiff makes it clear that he expects this court and, in this case, a jury which has been demanded to decide who is and who is not an orthodox rabbi, what is and what is not kosher

poultry, and whether plaintiff's *schoictim* were *treife.* Certainly these issues, if relevant, require probing into the qualifications of orthodox rabbis and interpretations to establish whether poultry is, in fact, kosher and such other matters as whether plaintiff's *schoictim* were *treife.*

"It is to be noted that among other matters set forth in plaintiff's affidavit he asserts that defendant Glasner is not an orthodox rabbi and that members of the congregation will be subpoenaed to 'testify that there was mixed seating between men and women.' This alleged conduct of defendant Glasner is referred to as 'his transgressions regarding mixed seating.' This hardly seems a dietary matter."

At least two if not more times in his brief, appellant refers to the allegation in his amended complaint to the effect that Salter and Reyna, former employees of plaintiff, were offered payment to falsely testify that plaintiff was not slaughtering chickens pursuant to orthodox Hebrew religious requirements. (O.B. pp. 4 and 27.) The Glasner affidavit expressly and affirmatively swears that he did not participate or direct any arrangement whereby either of these persons "were to appear as witnesses and at no time either offered them a payment or suggested to them, or either of them, that they testify falsely." Significantly, no affidavit of either of these persons was produced by appellant. And significantly appellant's own affidavit is silent thereon. This factor, which appellant apparently seizes upon in his brief, was entirely shown to be false as likewise are many other charges made by appellant.

More could but need not be said concerning the affidavits. The trial court's determination is not only supported thereby but also by the records and files, including the allegations of plaintiff's amended pleading. These show (1) that the damages and redress sought are those for which plaintiff, as an individual, was not entitled since they concern and belong to West Coast Poultry Company a corporation; and (2) that the acts done by appellee Glasner were within the perimeter of his official duties and authority as the State Kosher Food Law Representative.

Conclusion.

For the foregoing reasons and each of them, it is respectfully submitted that the judgment of the trial court should and must be affirmed as to appellee Glasner.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

WAYNE VEATCH

APPENDIX.

"CALIFORNIA STATE PERSONNEL BOARD

specification for the class of

KOSHER FOOD LAW REPRESENTATIVE

"Definition:

"Under direction of the Chief, Bureau of Food and Drug Inspections, Department of Public Health, to carry out the statewide program of investigation and inspection in connection with the enforcement of the State Kosher Food Law; and to do other work as required.

"Typical Tasks:

"As assigned, in the major metropolitan areas of the State, initiates and carries out a field inspection program designed to secure understanding of and compliance with the State Kosher Food Law; visits and inspects meat and poultry markets offering kosher products for sale to assure that such products have been properly identified, labeled, segregated, advertised, and otherwise handled in a manner consistent with orthodox Hebrew religious ritual and custom; inspects establishments such as delicatessens, restaurants, catering firms, and rest homes purveying kosher foods to see that products sold as kosher are, in fact, kosher and that they have been processed and served in a manner and with dishes, utensils, and vessels prescribed by Hebrew Law and customs; makes field surveys to determine that kosher foods are properly prepared, stored, processed, labeled and advertised; meets with and advises interested persons such as kosher meat and poultry

packers, wholesalers, retailers, and restaurateurs on application of the State Kosher Food Law and on proper practices to follow to insure compliance with this law; confers with violators of the Kosher Food Law in an effort to secure voluntary compliance with its provisions; conducts field investigations of complaints regarding kosher foods alleged to have been prepared, packaged, sold, or advertised in violation of the State Kosher Food Law; conducts investigations, gathers, assembles, and reports facts and evidence; assists in the preparation of cases for prosecution when necessary; works cooperatively with representatives of other governmental agencies including the State and Federal Departments of Agriculture and local law enforcement officials; prepares reports of field activities.

"Minimum Qualifications:

"Ordained orthodox rabbi, in good standing with a recognized California or national rabbinical body and accredited to function in all spheres of the rabbinate.

and

"Education: Completion of theological studies for ordination as a rabbi at a recognized Jewish theological school."